Intelek Timur Sdn Bhd v Future Heritage Sdn Bhd

FEDERAL COURT (KUALA LUMPUR) — CIVIL APPEAL NO 02–6 OF 2003(W)
HAIDAR CJ (MALAYA), SITI NORMA YAAKOB AND RAHMAH HUSSAIN FCJJ
19 JANUARY 2004

Arbitration — Award — Error of law — Arbitrator failing to fully appraise provision in contract under scrutiny — Whether error of law on the face of the award occasioned — Whether interference of court justified

Arbitration — Award — Question of law — Arbitrator to determine whether respondent had lawfully determined its own employment — Whether a question of law material to arbitrator's decision

Arbitration — Award — Setting aside — When court may set aside award — Arbitration Act 1952 s 24(2)

The appellant appointed the respondent to undertake the development andcompletion of a low cost housing project by a letter of award dated 16September 1996. The letter of award incorporated the PAM Standard Form Agreement, which inter alia, contains provisions referring disputes or differences between the parties to arbitration. The parties entered into a contract of employment whereby the appellant agreed to pay the respondent on progress certificates ('certificates of payment') issued by the appellant's architect based on works done by the respondent. In 1997, the parties agreed to have future payments subject to a factoring agreement entered between the respondent and one Showa Factoring (Malaysia) Sdn Bhd ('Showa') whereby the respondent would submit its invoices (based on the certificates of payment) to Showa. The invoices would then be factored and Showa would pay the respondent 80% of the invoiced amounts with the balance 20% paid, less interest charges, after Showa received the invoiced sums from the appellant. Disputes subsequently arose between Showa and the appellant as a result of which the respondent was only paid 80% of the full amount due under Certificates of Payment Nos 9 and 10. Due to the non-payment of the full amount under Certificates of Payment Nos 9 and 10, the respondent decided to determine the contract by issuing a notice dated 10 December 1997 pursuant to cl 26(1)(a) of the contract. Clause 26(1) was subject to a proviso to the effect that a notice of determination should not be given unreasonably or vexatioustly. However, the respondent issued a notice of determination dated 19 December 1997 and thereafter stopped all works at the construction site. The appellant's architect issued a similar notice dated 24 December 1997 pursuant to cl 25(i)(a) and/or (b) of the contract alleging that the respondent had without reasonable cause defaulted in completing the project. The dispute between the appellant and respondent was referred to arbitration. By an award dated 16 June 2000, the arbitrator, inter alia, dismissed the appellant's claims and allowed the respondent's counterclaim. The appellant challenged the arbitrator's award in the High Court on the ground that the arbitrator was guilty of misconduct.

The High Court agreed with the appellant and set aside the award on the ground that there had been a miscarriage of justice. The respondent appealed to the Court of Appeal which found for the respondent and restored the award of the arbitrator. The appellant obtained leave to appeal to the Federal Court and the following question was presented for the Court's determination, namely whether pursuant to s 24(2) of the Arbitration Act 1952 ('the Act') the High Court may set aside an arbitrator's award for misconduct and/or error of law on the face of the award on the grounds that the arbitrator: (i) made wrong inferences of fact from the evidence including the documents incorporated in the award; and/or (ii) erroneously construed the provisions of a contract on principles of construction which the law does not countenance.

Held, allowing the appeal:

(1) An arbitrator's award is final, binding and conclusive and can only be challenged in exceptional circumstances. Even if an arbitrator had erred by drawing wrong inferences of fact from the evidence before him be it oral or documentary, that in itself would not be not sufficient to warrant the setting aside of the award. The power to set aside an award under s 24(2) of the Act can only be exercised where the arbitrator has misconducted himself or the award has been improperly procured. Whether an award has been improperly procured, depends on the issues or the questions that have been referred to the arbitrator. Where in deciding a dispute referred to him, the arbitrator has also to determine a question of law that becomes material to his decision in the dispute, interference by the court is only possible if an error appears on the face of the award (see paras 13–14); *Sharikat Pemborong Pertanian & Perumahan v Federal Land Development Authority* [1971] 2 MLJ 210 and *Ganda Edible Oils Sdn Bhd v Transgrain BV* [1988] 1 MLJ 428 followed.

(2) In the instant case, the arbitrator had to, inter alia, determine whether the respondent had lawfully determined its own employment pursuant to cl 26(1)(a) of the contract. This was a question of law, with interference of the court possible if there was an error on the face of the award. On the facts, the arbitrator in dealing with cl 26(1)(a) was more concerned with whether the respondent had complied with the procedure of serving the notice of determination as laid down in the contract. He did not direct his mind to the proviso as to whether the notice had been issued unreasonably or vexatiously. He had not subjected himself to the crucial question as to the respondent's conduct in sending the notice and in so doing had, on principles of construction, erroneously construed the provisions of cl 26(l)(a). It was in this respect that the Court of Appeal fell into error in assuming that the arbitrator had considered the whole clause in its entirety. The failure to analyze and appraise the effect of cl 26(1)(a) in its entirety, as was apparent on the face of the record, was one instance of conduct which the law did not countenance. This error of law thus empowered the Federal Court to have the award set aside (see paras 16–19).

(3) The first part of the question posed to the Federal Court was answered in the negative and the second part of the question answered in the positive. The appeal should be allowed. Since the appellant succeeded in part, it should only be entitled to half its costs as well as a refund of the costs deposited in the appeal (see para 20).

[**Bahasa Malaysia summary**

Perayu telah melantik responden untuk melaksanakan pembangunan dan penyelesaian projek perumahan kos rendah melalui satu surat tawaran bertarikh 16 September 1996. Surat tawaran yang membentuk Perjanjian Borang Standard PAM, yang antara lain, mengandungi peruntukan-peruntukan merujuk pertikaian atau perbezaan antar pihak-pihak kepada timbangtara. Pihak-pihak telah memasuki satu kontrak pekerjaan di mana perayu bersetuju membayar responden berdasarkan sijil-sijil kemajuan ('sijil-sijil bayaran') yang dikeluarkan oleh arkitek perayu berdasarkan kerja-kerja yang telah dibuat oleh responden. Pada 1997, pihak-pihak bersetuju kepada bayaran masa hadapan tertakluk kepada perjanjian pemfaktoran yang dimasuki antara respondent dan Showa Factoring (Malaysia) Sdn Bhd ('Showa') di mana responden akan mengemukakan invois-invoisnya (berdasarkan sijil-sijil bayaran) kepada Showa. Invois-invois tersebut akan kemudiannya difaktorkan dan Showa akan membayar responden 80% daripada jumlah yang diinvoiskan dengan baki 20% dibayar, selepas ditolak caj faedah, selepas Showa menerima jumlah yang diinvoiskan daripada perayu. Pertikaian berikutnya timbul antara Showa dan perayu akibat dari itu responden hanya dibayar 80% daripada bayaran penuh yang perlu dibayar di bawah Sijil-Sijil Bayaran No 9 dan 10. Akibat daripada jumalh penuh yang tidak dibayar di bawah Sijil-Sijil Bayaran No 9 dan 10, responden telah membuat keputusan untuk menentukan kontrak dengan mengeluarkan satu notis bertarikh 10Disember 1997 menurut kl 26(1)(a) kontrak tersebut. Klausa 26(1) tertakluk kepada satu proviso yang mana satu notis penentuan tidak sepatutnya diberikan jika tidak munasabah dan menyusahkan. Namun begitu, responden telah mengeluarkan satu notis penentuan bertarikh 19December 1997 dan selpas dari itu memberhentikan semua kerja ditapak pembinaan. Arkitek perayu telah mengeluarkan notis yang sama bertarikh 24 Disember 1997 menurut kl 25(i)(a) dan/atau (b) kontrak tersebut mengatakan bahawa responden telah tanpa sebab yang munasabah gagal untuk menyiapkan projek tersebut. Pertikaian antara perayu dan responden telah dirujuk kepada timbangtara. Melalui satu award bertarikh 16 Jun 2000, penimbangtara, antara lain, telah menolak tuntutan perayu dan membenarkan tuntutan balas responden. Perayu telah mencabar award penimbangtara di Mahkamah Tinggi atas alasan bahawa penimbangtara telah tersalah laku. Mahkamah Tinggi bersetuju dengan perayu dan mengenepikan award tersebut atas alasan bahawa telah berlaku ketidakadilan. Responden telah merayu ke Mahkamah Rayuan yang menyebelahi responden dan mengekalkan award penimbangtara tersebut. Perayu telah memperoleh kebenaran untuk merayu ke Mahkamah Persekutuan dan persoalan yang dikemukakan untuk penentuan mahkamah adalah, terutamanya sama ada menurut s 24(2) Akta

Timbangtara 1952 ('Akta tersebut') Mahkamah Tinggi boleh mengenepikan award penimbangtara kerana salah laku dan/atau kesilapan undang-undang atas award tersebut atas alasan bahawa penimbangtara tersebut: (i) telah membuat inferens yang salah terhadap fakta berdasarkan keterangan termasuklah dokumen-dokumen yang disertakan dalam award tersebut; dan/atau (ii) telah tersilap menafsir peruntukan-peruntukan kontrak berdasarkan prinsip-prinsip pembentukannya yang mana undang-undang tidak menyokong.

Diputuskan, membenarkan rayuan tersebut:

(1) Award timbangtara adalah muktamad, mengikat dan konklusif dan hanya boleh dicabar dalam keadaan luar biasa. Sekiranya timbangtara telah tersilap dengan membuat inferens yang salah tentang fakta berdasarkan keterangan di hadapannya sama ada secara lisan atau dokumentar, maka dengan sendirinya ia tidak mencukupi untuk mewarankan penepian award tersebut. Kuasa untuk mengenepikan award di bawah s 24(2) Akta tersebut hanya boleh digunakan di mana timbangtara telah salah laku atau award tersebut telah dibuat dengan tidak betul. Sama ada award telah dibuat dengan tidak betul, bergantung kepada persoalan-persoalanyang telah dirujuk kepada timbangtara. Dalam membuat keputusan tentang satu pertikaian yang dirujuk kepada beliau, penimbangtara juga perlu menentukan persoalan undang-undang yang penting untuk keputusannya dalam pertikaian tersebut, mahkamah hanya boleh campur tangan jika kesilapan tersebut wujud atas muka award tersebut (lihat perenggan-perenggan 13–14); *Sharikat Pemborong Pertanian & Perumahan v Federal Land Development Authority* [1971] 2 MLJ 210 dan *Ganda Edible Oils Sdn Bhd v Transgrain BV* [1988] 1 MLJ 428 diikut.

(2) Dalam kes semasa, penimbangtara perlu, antara lain, menentukan sama ada responden telah dengan sah menentukan pekerjaannya menurut kl 26(1)(a) kontrak. Ini adalah persoalan undang-undang, dan campur tangan mahkamah hanya mungkin jika kesilapan terdapat atas muka award. Berdasarkan fakta-fakta, penimbangtara dalam membincangkan kl 26(1)(a) lebih prihatin sama ada responden telah mematuhi prosedur menyampaikan notis penentuan tersebut sebagaiaman yang dinyatakan dalam kontrak tersebut. Beliau tidak mengarahkan mindanya kepada proviso tentang sama ada notis tersebut telah dikeluarkan secara tidak munasabah atau menyusahkan. Beliau tidak meletakkan dirinya dengan persoalan penting berhubung perbuatan responden menghantar notis tersebut dan dengan berbuat demikian telah, atas prinsip-prinsip pembentukan, telah dengan silap menafsir kl 26(l)(a). Berdasarkan ini Mahkamah Rayuan telah terkhilaf dengan mengandaikan bahwa penimbangtara telah menimbangkan keseluruhan klausa tersebut dengan meyeluruh. Kegagalan untuk menganalisa dan menilai akibat kl 26(1)(a) secara keseluruhan, seperti yang jelas atas muka rekod tersebut, adalah satu perbuatan yang tidak disokong oleh undang-undang. Kesilapan undang-undang tersebut oleh itu memberi kuasa kepada Mahkamah Persekutuan untuk mengenepikan award tersebut (lihat perenggan-perenggan 16–19).

(3) Bahagian pertama persoalan yang diutarakan ke Mahkamah Persekutuan telah dijawab secara negatif dan bahagian kedua persoalan telah dijawab secara positif. Rayuan tersebut hendaklah dibenarkan. Memandangkan perayu telah berjaya sebahagiannya, ia hendaklah berhak kepada separuh daripada kosnya dan juga sebagai bayaran balik kos yang didepositkan dalam rayuan tersebut (lihat perenggan 20).]

Notes

For cases on error of law on award generally, see 1 *Mallal's Digest* (4th Ed, 2002 Reissue) paras 1155–1250.

For cases on question of law on award generally, see 1 *Mallal's Digest* (4th Ed, 2002 Reissue) paras 1155–1250.

For cases on setting aside of award generally, see 1 *Mallal's Digest* (4th Ed, 2002 Reissue) paras 1202–1245.

Cases referred to

Ganda Edible Oils Sdn Bhd v Transgrain BV [1988] 1 MLJ 428 (folld)

Sharikat Pemborong Pertanian & Perumahan v Federal Land Development Authority [1971] 2 MLJ 210 (folld)

Legislation referred to

Arbitration Act 1952 s 24(2)

Ramdas Tikamdas (Ernest Azad with him) (Ernest Azad & Assoc) for the appellant.
Suria Kumar (Suria Kumar & Co) for the respondent.

Siti Norma Yaakob FCJ (delivering judgment of the court):

[1] The question that is posed to us in this appeal comes in two parts and it reads as follows.

> Whether pursuant to section 24(2) of the Arbitration Act 1952 ('the Act') the High Court can exercise its powers to set aside an arbitrator's award for misconduct and/or error of law on the face of the award on the grounds that:
>
> (i) the arbitrator is held to have made wrong inferences of fact from the evidence including the documents incorporated in the award, and/or
>
> (ii) the arbitrator is held to have erroneously construed the provisions of a contract on principles of construction which the law does not countenance.

[2] This question arose from proceedings referred by both parties to an arbitrator, Mr Jerry Sum Phoon Mun ('the arbitrator') pursuant to the terms and conditions of a contract of employment which both parties had entered into. By a letter of award dated 16 September 1996, issued by the appellant's architect, the appellant, a developer, appointed the respondent to undertake the development and completion of a low cost housing project in Hulu Langat, Selangor. The letter of award incorporated the Pertubuhan

Akitek Malaysia ('PAM') Standard Form Agreement, which inter alia, contains provisions referring disputes or differences between the parties to arbitration.

[3] In accordance with the contract of employment, the appellant paid the respondent on the progress certificates issued by the appellant's architect based on the works done by the respondent. It is in respect of payments of some of these certificates that the parties came to disagreement.

[4] There is no dispute over Certificates Nos l to 5 as the appellant honoured those within the stipulated 60 days from the date of each claim and the amounts due were paid directly to the respondent.

[5] Then in early 1997, the parties agreed that all future progress claims were to be settled by a factoring agreement entered into by the respondent with Showa Factoring (Malaysia) Sdn Bhd ('Showa') whereby the respondent would submit its invoices (based on the certificates of payment) to Showa. The invoices would be factored and Showa would pay the respondent 80% of the invoiced amounts. The balance of 20% would be released by Showa less interest charges, after Showa received the invoiced sums from the appellant.

[6] Based on the factoring arrangement, the respondent was paid all sums due on Certificates of Payment Nos 6, 7, 8 and 11 although it experienced some delays. It received the 80% sums due from Showa as well as the 20% less interest charges after the appellant had paid Showa the factored invoiced sums. For Certificate of Payment No 12, payment of the sum due was made directly to the respondent and not under the terms of the factoring agreement. However, the respondent was not so lucky with Certificates of Payment Nos 9 and 10 as the respondent only received 80% of all sums claimed but not the balance of the 20% as the appellant had failed to pay the factored invoiced sums at the material time to Showa due to disputes arising between the appellant and Showa.

[7] It was following the non-receipt of the full sums due on Certificates of Payment Nos 9 and 10 that the respondent decided to determine the contract by issuing a notice dated 10 December 1997, pursuant to cl 26(l)(a) of the contract and by another letter dated 19 December 1997, notified the appellant that it no longer regarded itself as being employed as the appellant's contractor in respect of the housing development.

[8] It was following the issuance of the notice of determination dated 19December 1997, that the respondent stopped all works at the site. This prompted the appellant's architect to issue a similar notice dated 24December 1997 pursuant to cl 25(i)(a) and/or (b) of the contract on the ground that the respondent had without reasonable cause defaulted in completing the project.

[9] It was under those circumstances that the President of PAM appointed the arbitrator in May of 1998 to look into the appellant's claims for losses and damages against the respondent and the respondent's counterclaim for the same remedies against the appellant.

[10] In his award dated 16 June 2000, the arbitrator dismissed the appellant's claims and allowed the respondent's counterclaim and assessed its losses and damages at RM2,137,549.70 and ordered that such damages be settled by the appellant within 14 days from the date the award is taken by either party.

[11] Dissatisfied, the appellant challenged the arbitrator's award in the High Court on the grounds that the arbitrator was guilty of misconduct. Faiza Tamby Chik J, agreed with the appellant and set aside the award on the ground that there had been a miscarriage of justice.

[12] The respondent took the matter further to the Court of Appeal that found for the respondent and restored the award of the arbitrator. It is against this finding that leave was granted by this Court to determine the question which I had referred to at the beginning of this judgment.

[13] The law regarding the effect of an arbitrator's award is well settled in that the award is final, binding and conclusive and can only be challenged in exceptional circumstances. As such, if an arbitrator had erred by drawing wrong inferences of fact from the evidence before him, be it oral or documentary, that in itself is not sufficient to warrant the setting aside of his award. 'It would be contrary to all the established legal principles relating to arbitration if an award based upon the evidence presented were liable to be reopened on the suggestion that some of the evidence had been "misapprehended and misunderstood"' per Raja Azlan Shah J (as he then was) in *Sharikat Pemborong Pertanian & Perumahan v Federal Land Development Authority* [1971] 2 MLJ 210.

[14] The power to set aside an award under s 24(2) of the Act can only be exercised where the arbitrator has misconducted himself or the award has been improperly procured. Acts of misconduct have been defined and explored in *Sharikat Pemborong* in the following manner (at p 211):

> In the law of arbitration misconduct is used in its technical sense as denoting irregularity and not moral turpitude. It includes failure to perform the essential duties which are cast on an arbitrator as such, for instance, failure to observe the rules of natural justice, appearance of bias or partiality. It also includes any irregularity of action which is not consonant with the general principles of equity and good conscience. These illustrations are not meant to be exhaustive. But failure to analyze, and appraise the evidence does not vitiate the award on the ground of misconduct. It is only when the evidence is material relevant and had gone to affect the award that the award will be vitiated.

[15] As to the determination of whether the award has been improperly procured, this must depend on the issues or the questions that have been referred to the arbitrator. It is from these issues or questions that the arbitrator has to make findings of fact on the evidence adduced before him and more often than not, questions of law arise from his findings of fact. It is under these circumstances that Raja Azlan Shah J in *Sharikat Pemborong* sounded a warning that reads as follows (at p 211):

It is essential to keep the distinction between a case where a dispute is referred to an arbitrator in the decision of which a question of law becomes material from the case in which a specific question of law has been referred to him. The wealth of authorities make a clear distinction between the two classes of cases and they decide that in the former case the court can interfere if and when any error appears on the face of the award but in the latter case no such interference is possible upon the ground that the decision upon the question of law is an erroneous one.

[16] In this appeal, the arbitrator made a number of findings as can be seen from his award but of particular interest is the question of whether the respondent had lawfully determined its own employment pursuant to cl 26(1)(a) of the contract. Per se this is a question of law but it must be remembered that this was not the only issue that was referred to him. There were other issues that were raised before him and they include:

(1) whether the appellant handed over possession of the entire site o the respondent on 2 September 1996;

(2) whether the parties negotiated and agreed to a revised date of completion for each block constructed;

(3) whether the period for honouring interim payments was 60 days from the date of the respondent's progress payment claims;

(4) whether the appellant had defaulted in honouring Certificate of Payment Nos 1 to 5;

(5) whether the same situation arose with regard to Certificate of Payment Nos 6 to 11;

(6) what was the factual situation with regard to Certificate of Payment No 12;

(7) whether the appellant's determination of the respondent's employment was proper and lawful;

(8) whether the respondent was entitled to be compensated for all losses arising from the lawful determination of its employment.

[17] In making the various findings of fact as stated in his award, the arbitrator had also to consider whether the respondent's contract of employment had been legally determined under cl 26(l)(a) as fault or liability had to be established to determine whose claims can succeed. It must be remembered that in this case both parties were pointing a finger at each other with each alleging that the other had breached the contract. Under these circumstances, I consider that the matter for arbitration falls within the first category of cases which had been distinguished by *Sharikat Pemborong* namely that when deciding the dispute that had been referred to him the arbitrator had also to determine a question of law which had become material in his decision to the dispute referred. That said, interference is possible if an error appears on the face of the award. In *Ganda Edible Oils Sdn Bhd v Transgrain BV* [1988] 1 MLJ 428, the Supreme Court in laying down the principles when an arbitrator's award can be set aside had, inter alia, adopted those that have

A been identified in *Halsbury's Laws of England* (4th Ed), p 334 para 623 to be as follows:

> … and where the question referred for arbitration is a question of construction, which is, generally speaking, a question of law, the arbitrator's decision cannot be set aside only because the court would itself have come to a different conclusion;
B but if it appears on the face of the award that the arbitrator has proceeded illegally, as, for instance, by deciding on evidence which was not admissible, or on principles of construction which the law does not countenance, there is error in law which may be ground for setting aside the award.

[18] Turning now to the contract in this appeal, the provisions of cl 26(1)
C (a) reads as follows:

> Without prejudice to any other rights and remedies which the Contractor may possess, if —
>
> (a) the Employer does not pay to the Contractor the amount due on any certificate within the Period from Honouring Certificates named in the Appendix to these Conditions and Continues such default for seven
D day after receipt by registered post or recorded delivery of a notice from the Contractor stating that notice of determination under this Condition will be served if payment is not made within seven days from receipt thereof; or
>
> (b) …;
>
> E (c) …;
>
> (d) …
>
> then the Contractor may thereupon by notice by registered post or recorded delivery to the Employer or Architect forthwith determine the employment of the Contractor under this C ontract;*provided that such notice shall not be given unreasonably*
F *or vexatiously.(*Emphasis added.)

[19] In dealing with, this particular clause in his award, the arbitrator was more concerned with the issue as to whether the respondent had complied with the procedure of serving the notice of determination as laid down in the contract. He did not direct his mind to the proviso as to whether the
G notice had been issued unreasonably or vexatiously. He had not subjected himself to the crucial question as to the respondent's conduct in sending the notice and in so doing had, on principles of construction, erroneously construed the provisions of cl 26(1)(a). It is in this respect that the Court of Appeal fell into error in assuming that the arbitrator had considered the whole clause in its entirety. I say that this failure to analyse and appraise the
H effect of cl 26(1)(a) in its entirety, as is apparent on the face of the record, is one instance of conduct which the law does not countenance and it is this error of law that empowers me to have the award set aside, which I now do.

[20] For the reasons appearing in this judgment, I answer the first part of the question posed in this appeal in the negative and the second part in the
I positive. Accordingly, this appeal is allowed and since the appellant has succeeded in part, it is only entitled to half its costs as well as a refund of the costs deposited in this appeal.

[21] In this respect, my brother, Haidar CJ (Malaya), and my sister, Rahman Hussain FCJ, who have had sight of this judgment agree that for the reasons given therein such orders be made accordingly.

Appeal allowed.

Reported by Andrew Christopher Simon